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See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

AUG 21 2008

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,

Appellee,

v.

ROBERT DONALD MALY,

Appellant.

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) 2 CA-CR 2007-0038
)
) DEPARTMENT B
)
)

MEMORANDUM DECISION

) Not for Publication
)
) Rule 111, Rules of
)
) the Supreme Court
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)

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20040745

Honorable Hector E. Campoy, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Amy M. Thorson

Tucson
Attorneys for Appellee

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E C K E R S T R O M, Presiding Judge.

¶1 Appellant Robert Maly was convicted after a jury trial of two counts of theft by control. On one count, the jury found the stolen property to have a value of \$3,000 or more and, on the other, a value between \$250 and \$1,000. The jury could not reach a verdict on the count charging Maly with burglary, and the court dismissed it. The trial court sentenced Maly to mitigated, concurrent prison terms of ten and three years. He argues on appeal the state failed to prove he knowingly controlled the stolen property and the court erroneously gave a jury instruction on a defendant's flight or concealment after a crime. We affirm Maly's convictions and sentences.

¶2 Viewing the evidence and the reasonable inferences therefrom in the light most favorable to sustaining the convictions, as we must, *see State v. Rasul*, 216 Ariz. 491, ¶ 2, 167 P.3d 1286, 1288 (App. 2007), the following facts were established at trial. On the morning of January 14, 2004, two construction workers arrived at their employer's job site, a rural water pump station, to find the lock on the gate had been cut. The men discovered a welding machine, a toolbox, and other tools and welding equipment were missing from the site. The men called the sheriff's department, and a deputy arrived to investigate.

¶3 During the investigation, a silent tracking device that had been installed on the welder was turned on by the manufacturer, sending out a radio frequency signal that could be detected by police vehicles equipped with a receiver. The deputy installed a portable receiver on his vehicle and almost immediately received a signal. He and a detective

followed the signal to a residence on Camino del Emperador that the deputy “associated” with Maly, Maly’s brother, and their mother.

¶4 The officers knocked on the door of the residence but received no response. During that time, a man named Troy appeared from the back of the home. The deputy spoke with Troy and waited at the house while the detective obtained a search warrant. Troy stated Maly had just left in a brown Ford pickup, the same make and model of vehicle the deputy had seen passing the officers on their way to the residence.

¶5 When officers executed the search warrant, none of the Maly family was present. In the backyard, the officers found most of the items that had been reported stolen. They found the welder under a tarp. The stolen toolbox had been freshly painted, and the welder was in the process of being repainted. At Maly’s mother’s residence, one of the construction workers found his hammer among tools scattered on the floor of the garage. He estimated that the combined value of all his personal tools that had been stolen was about \$1,000. His supervisor valued the company-owned equipment that had been stolen between \$3,000 and \$5,000.

¶6 After the officers executed the search warrant, sheriff’s deputies on patrol attempted to locate Maly. One deputy used an unmarked surveillance vehicle, while another deputy and their sergeant used marked patrol cars to investigate both the Maly homes. The deputy in the unmarked vehicle went to Maly’s mother’s residence while the patrol cars investigated the Emperador house.

¶7 At Maly's mother's house, the deputy walked to the back of the residence to check for signs that someone was home and heard a man's and a woman's voice inside the bedroom. He also heard and saw signs that a television set was on. Another deputy then made a telephone call to the residence. The deputy conducting surveillance could hear the telephone ringing and the woman saying something like, "[L]et's see who it is first." The other deputy did not leave a message after the first call but, when he called again and the answering machine came on, he stated that he was from the sheriff's department, that he knew someone was inside, and that they should come out without weapons.

¶8 The deputy conducting surveillance observed a woman standing by the answering machine, but no one picked up the phone. At one point, the deputy was able to lie down on the ground outside and see into a back bedroom. From that position, he observed Maly's mother concealing him in a closet—clearing a space for him and then “putting items back in the closet basically kind of on top of him.” The officers decided to wait to obtain a warrant and did not make contact with Maly on that night.

¶9 Approximately one month later, a deputy saw Maly riding a bicycle. As he approached the deputy's vehicle, Maly appeared to look at the deputy before turning around and pedaling his bicycle rapidly back toward his mother's home. Maly rode his bicycle around the north side of the residence while the deputy ran around the south side. As Maly then began to run off into the desert after dropping his bicycle on the ground, the deputy ordered him to stop. Maly eventually obeyed and was detained. He told the deputy he was

not Robert Maly and gave an incorrect birthdate. The deputy eventually learned Maly's true name and date of birth and arrested him.

¶10 A sheriff's detective interviewed Maly the same day, and Maly began talking about the robbery before he was asked about it. He said three men—Troy, Billy, and a third person he would not name—had committed the thefts. He stated he knew the tools had been stolen and claimed his own truck had also been stolen. When the detective asked Maly why he hid and did not report the theft to police, Maly stated he believed he would have been arrested even though he was innocent. Maly also admitted he took a stolen hammer to his mother's residence.

¶11 The court had initially denied the state's request for a flight or concealment jury instruction. But, after hearing the evidence that Maly had hidden from law enforcement officers and then attempted to run when he was being arrested, the court decided to give the instruction. Following the close of the state's evidence, Maly moved for a judgment of acquittal on all counts pursuant to Rule 20, Ariz. R. Crim. P., which the court denied.

¶12 During the presentation of Maly's defense, the jurors watched a videotaped deposition of a man named James Steele testifying that he had committed the theft and Maly had not been involved. And Maly's mother testified that Maly lived with her at her residence and that her other son, who had been in prison at the time of the theft, lived at the Emperor home.

¶13 After the jury could not reach a verdict on the burglary charge, the court ordered a mistrial on that count and, at the state's request, then dismissed it with prejudice. The jury found Maly guilty of theft of property worth at least \$3,000 and theft of property worth between \$250 and \$1,000. The court found the state had proven two prior convictions for sentence-enhancement purposes and sentenced Maly to concurrent, mitigated terms totaling ten years' imprisonment. This appeal followed.

¶14 Maly argues the trial court erred when it failed to grant his motion for a judgment of acquittal on the theft charges because there was insufficient evidence that he knowingly controlled the stolen property. He contends the evidence "was circumstantial and based on nothing more than that the tools were hidden on his brother's property and that Maly lived nearby." He also contends that, because there was evidence providing a viable innocent explanation for his conduct, the court was required to grant a judgment of acquittal.

¶15 We will reverse a trial court's denial of a Rule 20 motion if there is no substantial evidence supporting the conviction. *State v. Henry*, 205 Ariz. 229, ¶ 11, 68 P.3d 455, 458 (App. 2003). Substantial evidence may be circumstantial or direct, so long as it is "evidence that a reasonable jury can accept as sufficient to infer guilt beyond a reasonable doubt." *Id.*; see also *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (relevant question in examining sufficiency of evidence to support conviction is whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt"). If

reasonable minds can differ on what inferences should be drawn from the evidence, the trial court must submit the case to the jury. *Henry*, 205 Ariz. 229, ¶ 11, 68 P.3d at 458.

¶16 To establish theft by control, the state must prove the defendant knowingly controlled another's property either "with the intent to deprive the other person of such property; or . . . knowing or having reason to know that the property was stolen." A.R.S. § 13-1802(A)(1), (5). In this context, controlling is defined as "act[ing] so as to exclude others from using their property except on the defendant's own terms." A.R.S. § 13-1801(A)(2). And in proving a person's knowledge that the property was stolen, evidence that the defendant possessed recently stolen property "may give rise to an inference that the person in possession of the property was aware of the risk that it had been stolen or in some way participated in its theft." A.R.S. § 13-2305(1); *see* § 13-1802(C) (applying § 13-2305 inferences to prosecutions for theft by controlling stolen property). Absent evidence of physical possession, the state may prove constructive possession, the knowing "exercise[of] dominion and control over property." A.R.S. § 13-105(33); *State v. Cox*, 214 Ariz. 518, ¶ 10, 155 P.3d 357, 359, *aff'd*, 217 Ariz. 353, 174 P.3d 265 (2007). Constructive possession can be proven by circumstantial evidence, *State v. Villalobos Alvarez*, 155 Ariz. 244, 245, 745 P.2d 991, 992 (App. 1987), and the state need only prove that the defendant shared control over the place the property was found, not that he had exclusive control. *See State v. Jenson*, 114 Ariz. 492, 493-94, 562 P.2d 372, 373-74 (1977).

¶17 Maly relies on *State v. Miramon*, 27 Ariz. App. 451, 555 P.2d 1139 (1976), to argue the state only proved his “brief presence at his brother’s house when the tools were there,” which he contends would be insufficient to sustain his conviction. But in *Miramon*, the defendant was merely a passenger in a car he did not own, in which marijuana was found under his seat. 27 Ariz. App. at 452, 555 P.2d at 1140. This court held that evidence the defendant may have known of the marijuana’s presence under the seat was not sufficient to show he had the “right to control its disposition or use.” *Id.* at 453, 555 P.2d at 1141.

¶18 In contrast, the state presented evidence here that Maly had dominion or control over the stolen property at the Emperador residence: he often left his truck parked there, had spent time there in the recent past, and admitted having been there the morning the tools were stolen. Moreover, he admitted physically possessing one of the stolen tools when he took it to his mother’s residence and admitted knowing the other tools and equipment were stolen. Combined with the evidence that he had hidden from police and attempted to flee when an officer tried to apprehend him, all the evidence allowed a reasonable jury to have found he knowingly possessed stolen property. *See, e.g., State v. Tarango*, 182 Ariz. 246, 249, 895 P.2d 1009, 1012 (App. 1994) (court properly denied Rule 20 motion on issue of possession when defendant present at search of house, had periodically spent nights there, admitted having access to drugs found in house, and tried to flee after being handcuffed), *aff’d*, 185 Ariz. 208, 914 P.2d 1300 (1996).

¶19 In the same vein, Maly contends that, because there was evidence providing an innocent explanation for his conduct, the trial court was required to grant a judgment of acquittal. Maly erroneously relies on *United States v. Vasquez-Chan*, 978 F.2d 546, 549 (9th Cir. 1992), in which the court actually stated that, if “there is an innocent explanation for a defendant’s conduct as well as one that suggests that the defendant was engaged in wrongdoing, the government must produce evidence that would allow a rational jury to conclude beyond a reasonable doubt that the latter explanation is the correct one.” As the state correctly notes, the Ninth Circuit merely restated the test for whether sufficient evidence supports a conviction. *See Jackson*, 443 U.S. at 319 (relevant inquiry is whether “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt”). We find no support in *Vasquez-Chan*, or any other case, for the proposition that a court must grant a judgment of acquittal whenever the defendant alleges a plausible innocent explanation for his conduct. *See State v. Nash*, 143 Ariz. 392, 404, 694 P.2d 222, 234 (1985) (state need not “negate every conceivable hypothesis of innocence when guilt has been established by circumstantial evidence”). Accordingly, the trial court did not abuse its discretion when it denied Maly’s Rule 20 motion.

¶20 Maly also argues the trial court committed fundamental error when it gave a jury instruction on flight that, he claims, was not supported by the evidence. However, fundamental-error review is confined to situations where the defendant failed to object to an alleged error at trial. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607

(2005). Here, Maly preserved his objection to the instruction. Thus, we review for an abuse of discretion the court's decision to so instruct the jury. *See State v. Johnson*, 205 Ariz. 413, ¶ 10, 72 P.3d 343, 347 (App. 2003). The court instructed the jury that:

In determining whether or not the State has proven the defendant guilty beyond a reasonable doubt, you may consider any evidence of the defendant's running away, hiding or concealing evidence, together with all the other evidence in the case. You may also consider the defendant's reason for running away, hiding or concealing evidence. Running away, hiding or concealing evidence after a crime is committed does not by itself prove guilt.

¶21 Maly contends "there was no evidence of 'flight' as defined in *State v. Smith*, 113 Ariz. 298, 552 P.2d 1192 (1976)[,] to warrant a flight instruction." A court errs by giving an instruction that is not "clearly supported by the evidence." *Smith*, 113 Ariz. at 300, 552 P.2d at 1194. Before giving a flight instruction, a court must determine whether the evidence "supports a reasonable inference that the flight or attempted flight was open, such as the result of an immediate pursuit." *Id.* Otherwise, "the evidence must support the inference that the accused utilized the element of concealment or attempted concealment." *Id.*

¶22 Maly conflates the two parts of the *Smith* test by arguing that "[t]he evidence of hiding did not result from immediate pursuit following the crime." But we find no requirement in *Smith* that, to be admissible as evidence, the flight or concealment must occur immediately after the crime was committed. Indeed, our supreme court has expressly stated otherwise. *See State v. Bible*, 175 Ariz. 549, 592, 858 P.2d 1152, 1195 (1993)

(“Within reason, the fact that flight or concealment is remote in time from the crime goes to the weight, not the admissibility, of the evidence.”).

¶23 Nor do we read *Smith* to require evidence that the concealment followed an immediate pursuit. *See State v. Hunter*, 136 Ariz. 45, 49, 664 P.2d 195, 199 (1983) (either flight or concealment behavior sufficient to support instruction; both need not be present); *State v. Swinburne*, 116 Ariz. 403, 414, 569 P.2d 833, 844 (1977) (flight instruction appropriate when defendant used several aliases and disguised appearance at time of both first and second arrests and during six-month period while a fugitive). Here, Maly was seen, and admitted, hiding from law enforcement officers on the day of the burglary. On the day of his arrest, Maly attempted to flee from an officer and then tried to conceal his identity. There was evidence “clearly support[ing]” the instruction, and the court did not abuse its discretion in giving it. *Smith*, 113 Ariz. at 300, 552 P.2d at 1194.

¶24 We affirm Maly’s convictions and sentences.

PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

PHILIP G. ESPINOSA, Judge

GARYE L. VÁSQUEZ, Judge